No. 2949 8

IN THE

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELLAMAR MINING COMPANY OF ALASKA, a Corporation,

Plaintiff in Error.

vs.

TONY POSSUS,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE.

This cause comes here on a Writ of Error sued out by the defendant below, to reverse a judgment rendered against said defendant in the court below, in an action at law for the recovery of damages for personal injuries alleged to have been sustained by plaintiff (defendant in error), by reason of an alleged accident while plaintiff was working for Ellamar Mining Company of Alaska, a corporation, defendant

(plaintiff in error), in said company's mine at Ellamar, Alaska.

For convenience, in this brief, the parties will be referred to as designated in the Court below.

The third amended complaint (R. pp. 4-5-6-7-8-9) alleges that defendant Ellamar Mining Company of Alaska, a corporation, is organized under the laws of the State of Washington and doing business in Alaska and at all times hereinafter mentioned was engaged in operating a copper mine at Ellamar, Alaska, in the Third Judicial Division of said Territory.

The said complaint further alleges that on or about the 12th day of January, 1916, and for about eight months prior thereto plaintiff was in the employ of defendant as a miner, usually engaged in operating a machine drill. On the date named plaintiff was working on the night shift on the 100 foot level of said company's mine. At about eight o'clock P. M., he and another miner named Louis, who was working with him, were ordered by the shift boss, Oscar Johnson, to leave their work and go to another part of the mine to assist in removing a slide that had just fallen. In order to reach the slide they were directed by said shift boss to ride upon a car down a track which ran to the glory hole about 1000 feet distant. Plaintiff and said Louis mounted said car and started same down the track, plaintiff riding in front. At the end of the track the car ran against a rock wall at the edge of the glory hole. In the contact of the car with said wall plaintiff was pinned under the car and

sustained the following injuries, to-wit: fracture of the right clavicle with separation limiting the motion of the right arm and shoulder; a severe bruise adjacent to the left eye which temporarily destroyed the sight so that the same was not fully restored for three months; a violent blow upon the jaw which badly bruised the same, knocked out one tooth, broke another tooth and partially paralyzed the use of the jaw for three months.

The complaint further alleges that at the time of suffering said injury plaintiff was a strong, healthy man, thirty-three years of age, an experienced and competent hard-rock miner and drill-man, able to earn the highest wages paid for such work, and at that time was receiving four dollars a day from defendant for his work, and that he has a mother dependent upon him for support; that he is unable to state, and is informed by competent surgical advice that it cannot be determined positively to what extent, if any, his said injury caused permanent disability but he believes that the same caused total disability for at least six months, and permanent partial disability to the extent of at least one-third of his earning power.

SECOND CAUSE OF ACTION.

The complaint further states as a second cause of action that plaintiff had been working in said mine for eight months prior to the date of said accident, and according to the rules of said mine the sum of $1.50 per month had been deducted from his wages

for hospital dues, which entitled him to care in a hospital and to competent surgical and medical attendance at the expense of defendant in case of his injury or illness arising in the course of his employment. Plaintiff alleges that after said accident he was taken to a house used by defendant as a hospital and kept there about twelve days, but no qualified surgeon or physician was in attendance upon him at any time, and no examination of his injuries was made or attempted to be made except by a woman who had charge of said hospital, one Mrs. Tramontine, who was not a physician or surgeon or even a trained nurse. He was assured by said woman that he had no injuries except bruises of the flesh and that there were no bones broken and that about twelve days after his injuries he was ordered out of the hospital by the general foreman, one Gedney, and that he received no further care from defendant company.

The complaint further alleges in the second cause of action (R. 7-8).

> "That during his stay in the hospital his injuries were not properly or sufficiently dressed and medicated and no care whatever was given to his broken clavicle. Plaintiff alleges that because of the wilful failure and refusal of defendant to give him timely and necessary surgical care to which he was entitled as aforesaid he has suffered great physical pain and mental torture for a long time after he might have recovered as fully as the nature of his injury permitted, thru proper surgical and medical care. That said unnecessary suffering has been due wholly to the gross negligence and the wilful failure and refu-

sal of defendant to give him the surgical attention and medical attendance to which he was entitled as aforesaid, and his present impaired physical condition is largely due to the same gross and wilful negligence of defendant, and the aggravation of his disability beyond the normal result of his original injury is wholly due to that cause."

The complaint further alleges in the second cause of action that because of defendant's

> "neglect and refusal to furnish him timely and sufficient surgical care and medical and hospital service which aggravated the result of his original injuries as aforesaid and his permanent disability and the unnecessary physical and mental suffering he has undergone he has been damaged in the sum of Fifteen Thousand Dollars ($15,000) (R. p. 8)."

Defendant answered admitting all of the allegations contained in plaintiff's first cause of action except that the plaintiff had his right clavicle fractured with separation limiting the motion of his right arm and shoulder or that his said clavicle was fractured or broken at all or that the motion of his right arm or right shoulder was in any manner limited other than such as bruises of the flesh and muscles would cause; denying that the sight of his left eye was temporarily destroyed or destroyed at all or in any manner impaired, or that he had a mother dependent upon him, or that surgical aid and skill could not determine to what extent the said injury caused permanent or total disability. In answer to the plaintiff's second cause of action defendant admitted the allegations re-

ferring to plaintiff's being in the employ of the company at the time of the accident; the amount of wages he was receiving; the amount of money deducted from his wages as hospital dues, but denying each and every other allegation therein contained, and alleging affirmative defenses to each of the two causes of action contained in the said complaint setting up a non-compliance, on the part of plaintiff, with the terms of Chapter 71 of the Session Laws of the Alaska Legislature of the year 1915, which Chapter is entitled, "An Act relating to the measure and recovery of compensation of injured employees in the mining industry of this Territory, and the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such industry, and repealing all Acts and parts of Acts in conflict with this Act," and also negligence on the part of said plaintiff in not complying therewith.

The affirmative defenses were denied in a reply (R. 49-50-51) filed by plaitniff; and the issues as defined by the third amended complaint, answer and reply, came on for trial before Hon. Charles E. Bunnell, Judge of said Court, and a Jury.

At the close of plaintiff's evidence defendant moved the Court to instruct the Jury to return a verdict on plaintiff's second cause of action, in favor of the defendant and against the plaintiff for the reason that the evidence offered in support of the second cause of action was uncertain and indefinite and it

was absolutely impossible for the jury to determine what part of the suffering was caused or was due to the alleged negligence of the defendant in not furnishing proper medical and surgical treatment and what part of the suffering was due to the original injury and that any verdict found for plaintiff on his second cause of action would be purely speculative and further than it was absolutely impossible for the jury to determine to what extent the original injury had been aggravated by reason of the alleged negligence of the defendant in not furnishing proper medical and hospital treatment; and further that any damages sustained by plaintiff by reason of the injuries he suffered on the 12th day of January, 1916, would be fully compensated by the findings of the jury in plaintiff's first cause of action; and to permit plaintiff to recover any damages under his second cause of action would be permitting him to recover damages twice for the same cause. After this motion was denied defendant moved the Court for a non-suit against plaintiff on the second cause of action on the grounds presented in defendant's motion for an instructed verdict. These motions were denied and exceptions duly taken were allowed (R. pp. 180-181-182-183). The defendant then put in its evidence.

Thereupon the Court instructed the jury as to the law of the case. It first instructed them as to the law applicable to the case, in the absence of special statutory provisions (R. pp. 304-305-306-307).

Later the Court instructed the jury as to "the law as it exists under and by virtue of 'the Work-

men's Compensation Act' " (R. pp.307-308-309-310; then the Court submitted certain findings to the jury on the first cause of action, as set out in plaintiff's third amended complaint and then submitted to the jury instructions covering the law governing these special findings (R. pp. 311-312-313-314).

The Court then submitted instructions to the jury covering the law concerning plaintiff's second cause of action (R. pp. 315-316-317-318-319-320-321).

Defendant requested the Court to give the jury certain instructions, most of which instructions were refused (R. pp. 325-326-327-328-330-331), to which refusal defendant excepted and its exceptions were allowed (R. p. 332). Thereupon the defendant requested the Court to submit a form of verdict to the jury which request was denied (R. p. 333) to which an exception was taken and allowed; thereupon the defendant objected to the form of verdict the Court was submitting to the jury; which objection was denied and an exception allowed (R. pp. 333-334).

A verdict was rendered against the defendant on the first cause of action for the sum of $1368 and on the second cause of action for the sum of One Dollar. (R. p. 338). After the verdict defendant made a motion for a New Trial for the following reasons (R. pp. 342 to 355):

I.

That the damages allowed by the jury were excessive and were given under the influence of passion and prejudice.

II.

That there was insufficiency of evidence to justify the verdict and that the same was contrary to law.

III.

Error in law occurring at the trial and excepted to by the party making the application.

The motion for a new trial was denied, to which ruling defendant excepted and such exceptions were allowed (R. 354).

There is very little dispute as to when and how plaintiff sustained injuries. There is no dispute as to plaintiff's being in the employ of defendant at the time of the accident or that he received injuries in the accident, but it is disputed as to plaintiff having his clavicle broken by reason of this accident, and of his right arm being permanently partially disabled by reason of his clavicle being broken. It is also disputed as to plaintiff having suffered mental anguish and pain by reason of the wilful negligence and neglect of defendant in not furnishing plaintiff timely and sufficient aid and necessary surgical care to which he was entitled (R. 40-41).

QUESTIONS INVOLVED.

The questions involved in this Statement of Facts and presented here by the Assignment of Errors together with the manner in which these questions are raised upon the record are as follows:

I.

(a) Plaintiff in Error contends that it was the duty of the trial Court to decide as a matter of law

whether this action should be based upon a common law liability or upon a liability under the "Workmen's Compensation Act" as passed by the Alaska Legislature in the year 1915, and instruct the jury accordingly; that it appeared conclusively under the pleadings and evidence, that the defendant Ellamar Mining Company of Alaska, a corporation, was a mining company in the Territory of Alaska at the time of plaintiff's injury within the terms of said Act, and therefore that plaintiff could only maintain this action against the defendant, under this Act, after proving that he was injured while in that company's employ; and that any injury plaintiff sustained by reason of any negligence on the part of defendant in not giving him proper medical care and attention was fully covered by the compensation designated by the provisions of said Act; and therefore, plaintiff could not maintain this action upon his second cause of action which is a common law action, but could only maintain this action against the defendant under the said "Compensation Act."

(b) That plaintiff could not maintain this action under both of his causes of action, basing his right to recover on his first cause of action upon the statute, and basing his right to recover on his second cause of action upon the common law, nor could he sue the defendant, relying both on the common law and the statute; that on account of such misjoinder the judgment against the defendant cannot stand, under the pleadings and evidence in this case; and that the court erred in instructing the jury as to the rules

of law applicable to an action based upon the common law and also to an action based upon the statute.

These questions are raised upon the record by the following Assignments of Error: i, viii, ix, x, xi, xiii, xviii, xix, xxi, xxiv, xxv, xxvii, xxviii, xxiv, xxxv and xxxix.

II.

Defendant contends that even if its foregoing position is not correct, and if this action could be maintained against the defendant on both causes of action, then that the evidence wholly fails to show any cause of action or right to recover against the defendant on either cause of action, for the following reasons:

(a) Plaintiff did not show that he received a broken or fractured clavicle limiting the separation of the right arm and shoulder while he was in the employ of defendant company.

(b) The evidence as directed toward plaintiff's second cause of action fails to show any negligence on the part of this company in not furnishing plaintiff with proper medical and surgical treatment.

(c) If the action should be based on the second cause of action the evidence shows as a matter of law that plaintiff cannot recover because of his negligence in not submitting to an examination and in his refusal to accept massage treatment for the muscles.

(d) If the action is based on the statute then the evidence shows that plaintiff did not receive the injury of a broken clavicle while in the employ of the defendant.

These questions are raised upon the record by the following Assignments of Error: viii, ix, xxi, xxii, xxiii, xxvii, xxviii, xxix, xxx, xxxi, xxxii, xxxiii, xxxiv, xxxvi, xxxvii, xxxviii, xxxix. (R. pp. 363 to 400).

III.

Plaintiff in Error contends that even if it is incorrect in all its foregoing contentions, and if the action can be maintained against this defendant on both causes of action under the evidence and the pleadings, nevertheless the Court erred in the trial of the case in giving and refusing to give instructions to the jury, which errors were highly prejudicial to this defendant, and because of which the judgment of the trial Court should be reversed and a new trial granted.

These questions are raised upon the record by the following Assignments of Error: xxiv, xxv, xxvi, xxvii, xxix, xxxii, xxxiii, xxxiv, xxxv, xxxvi, xxxvii, xxxviii, xxxix (R. pp. 389 to 402).

SPECIFICATION OF ERRORS RELIED UPON.

I.

The Court erred in making and entering its Minute Order of the 28th day of December, 1916, (R. 13-14) overruling the demurrer of defendant to plaintiff's third amended complaint.

II.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the first paragraph

of defendant's affirmative defense to plaintiff's first cause of action the following:

> "That shortly after said physician and surgeon notified said plaintiff as aforesaid, that he, the plaintiff had fully recovered from the injuries he received in said accident plaintiff voluntarily left Ellamar, Alaska, and without the defendant's knowledge and without making any demand whatever on the defendant for compensation for his injuries; that the defendant or none of its officers, had any knowledge of the whereabouts of said plaintiff from the time he left Ellamar, as aforesaid, until on or——" (R. p. 32).

III.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike fro mthe second paragraph of defendant's affirmative defense to plaintiff's first cause of action, the following:

> "The defendant thereupon acting through his said physician and surgeon, offered to furnish plaintiff board and lodging free and to give him daily massage treatment of the muscles for the purpose of relieving them of the alleged soreness and to continue this treatment and such other treatment as might be necessary until plaintiff was entirely relieved of said soreness; this offer plaintiff posively refused and thereupon demanded of defendant the sum of twenty five hundred dollars and upon the defendant refusing to pay said sum plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever" (R. pp. 32-33).

IV.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from defendant's affirmative defense to plaintiff's first cause of action all of paragraph four (R. 33).

V.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the second paragraph of defendant's affirmative defense to plaintiff's second cause of action, the following:

> "In order to better care for its employes who were slightly injured and to better administer first aid to those who might be seriously injured" (R. p. 33).

VI.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the second paragraph of defendant's affirmative defense to plaintiff's second cause of action, the following:

> "And shortly thereafter departed from Ellamar and defendant heard nothing of plaintiff and did not know of his whereabouts for more than two months thereafter" (R. 34).

VII.

The Court erred in making and entering its Order on the 30th day of December, 1916, sustaining plaintiff's motion to strike from the fifth paragraph of defendant's affirmative defense to plaintiff's sec-

ond cause of action, the following:

> "And thereupon demanded of defendant the sum of twenty-five hundred dollars and upon the defendant refusing to pay said sum plaintiff departed from Ellamar and refused to permit said physician and surgeon to treat him in any manner whatever" (R. p. 34).

VIII.

The Court erred in overruling defendant's objection to any testimony whatever being received in this trial on either cause of action contained in plaintiff's third amended complaint upon the ground that there are two causes of action improperly united in said complaint in this (R. pp. 59-60-61-62):

(a) Plaintiff's first cause of action as set forth in his third amended complaint, is an action *ex delicto* and plaintiff's second cause of action is an action *ex contractu*.

(b) Plaintiff's first cause of action as set forth in his third amended complaint, is a special statutory proceeding and plaintiff's second cause of action is a common law action.

IX.

The Court erred in overruling defendant's objection to a question asked by plaintiff's counsel which said question and objection and the exception allowed by the Court upon overruling the said objection, is set forth on pages 70 and 71 of this Record and are in words, following:

> "Q. How long did he suffer any pain or handicap in the use of his jaw?

Mr. Donohoe—We object to that question at this time on the ground that if the evidence is applied to the first cause of action is is incompetent, irrelevant and immaterial and I would like at this time to find out what would be the theory of the Court in trying this case, whether the first cause of action may be proven first and then the second or whether the evidence will be intermingled in the two causes of action—I am at a loss to know how to proceed on it.

The Court—Of course counsel will present the questions directed toward the first cause of action first but I anticipate that some of the questions which would be presented would also apply to the second cause of action. The objection will be overruled and defendant allowed an exception.''

X.

The Court erred in overruling defendant's objection to any testimony being offered in any manner tending to prove the allegations of plaintiff's second cause of action contained in plaintiff's third amended complaint. Said objections being made on the following grounds:

(a) That the complaint so far as that action is concerned does not state facts sufficient to constitute a cause of action.

(b) That it commingles the two causes of action together in such a manner that the jury will not be able to determine one from the other with any degree of certainty or definiteness'' (R. p. 72).

XI.

The Court erred in allowing testimony to be in-

troduced over the objection of defendant which testimony and objections and the ruling of the Court in overruling said objection appear on pages 72 and 73 of this record are in the fords following:

"Q. What kind of a bandage?"

Mr. DONOHOE—We make the same objection.

Objection overruled; defendant allowed an exception.

Q. Did she put anything else on besides the bandage?

Mr. DONOHOE—We object to that as leading.

Objection overruled; defendant allowed an exception.

Q. How long did she leave the bandage on you?

A. It was taken off next day.

Q. Did she put any other bandage on?

A. Just a plaster was left.

Q. How long did that remain on.

A. He says it was taken off the very next day after the second.

Q. Was there anything else placed on him then, after that?

A. He says some liquid, something in liquid for was put on his shoulder—some medicine in liquid form.

Q. Tell him to describe that plaster—how much of his body or shoulder did that cover?

Mr. DONOHOE—I have an objection and exception to all this line of testimony.

The COURT—Yes, sir."

XII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which tes-

timony and objections and the ruling of the Court appear on page 74 of this record and are in words following:

"Q. Did anybody connected with the company, that is, any officer of the company, come to see you at any time after you went into the hospital?

Mr. DONOHOE—We object to that question on the ground that it is incompetent, irrelevant and immaterial. It has been ruled out in the pleadings, that paragraph regarding the attempts to get a release from this man, and we object to its being testified to at this time because it is not within the pleadings.

By the COURT—He may answer; the objection will be overruled. Defendant allowed an exception to the ruling."

XIII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on pages 75 and 76 of this record and are in the words following:

"Q. What did Mr. Estey say if anything?

Mr. DONOHOE—We object to that question on the ground that it is incompetent, irrelevant and immaterial and not within the issues joined by the pleadings.

Mr. RITCHIE—We maintain it is admissible to support the second cause of action, showing the attitude of the company toward this plaintiff from the time of the accident until the present time and is part of the *res gestae*.

By the COURT—Mr. Interpreter, did you give

the entire answer to the last question?

The INTERPRETER—Yes, your Honor, I did.

The COURT—That was all of his answer?

The INTERPRETER—Yes.

By the COURT—He may answer the question. The objection will be overruled and defendant allowed an exception.

A. When he came to see him, he brought a paper to sign to him.

Q. What did he say about that paper?

Same objection; objection overruled—defendant allowed an exception.

A. He said Mr. Estey said to him, you sign this paper—if you sign your paper you get your half pay; if you don't sign we are going to throw you out the next day."

XIV.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on page 77 of this record and are in the following words:

"Q. Did he come there at any time afterward?

Mr. DONOHOE—We object to that question on the ground that it is incompetent, irrelevant and immaterial and on the further ground that it is shown by the plaintiff's testimony that Mr. Gedney had no power to bnd the defendant company in any manner whatever. He has already testified that Mr. Estey was in full command of the affairs there during the time of this accident.

Objection overruled; defendant allowed an exception."

XV.

The Court erred in overruling defendant's objection to the introduction of testimony, which testimony, objection and the ruling of the Court appear on page 79 of this record and are in the following words:

"Q. Why did you leave the bunk-house?

Mr. Donohoe—We object to that as incompetent, irrelevant and immaterial and not within the issues joined by the pleadings.

Objection overruled; defendant allowed an exception."

XVI.

The Court erred in allowing plaintiff to answer a question, over the objection of defendant, which question, objection and the ruling of the Court appear on page 81 of this record and are in the words following:

"Q. Have you given or sent anything to your mother for her support of late years?

Mr. Donohoe—We object to that as leading.

The Court—It is leading but he may answer the question.

Mr. Donohoe—We also object on the ground that the question is too indefinite; he says, has he given her or sent her anything within the last few years; that doesn't bring it within the scope of my understanding of the law.

Mr. Ritchie—I can't cover it all at once.

By the Court—I presume counsel will cover that by further questions. Tell him to answer yes or no, whether he has given his mother anything since he came to America for her support."

Defendant allowed an exception to the ruling."

XVII.

"The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony is as follows (R. pp. 83-84):

"Q. Have you suffered any pain from your injuries?

Mr. Donohoe. We object to that question on the ground that it is incompetent, irrelevant and immaterial. So far as the first cause of action is concerned it doesn't matter whether he suffered pain or not, if directed to the second cause of action, the two actions are so intermingled that it would be impossible for the jury with any degree of certainty to determine what portion of this pain and suffering would apply to the one cause and what would apply to the other cause.

A. He says he pains occasionally now yet from the injury. He says right in his shoulder is the pain and he says occasionally he has pains in his head. He says he doesn't have no pain when he doesn't use his arm or move his arm, but when he moves the arm then he has got a pain in his shoulder. He says—No he didn't try—it is always painful to lift his arm and his arm pains yet."

XVIII.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection and the ruling of the Court appear on pages 111 and 112 of this record, and are in the following words:

"Q. Why did you leave the bunk-house and go to Jim Fielders?

Mr. Donohoe—We object to that as repetition.

The Court—He may answer. Objection overruled; defendant allowed an exception.

Q. What did he say; tell him to give the exact words Mr. Estey used if he remembers?

Mr. Donohoe—We object to that question on the ground that there is nothing in the pleadings complaining of this treatment by Mr. Estey.

The Court—He may answer. The objection will be overruled and exception allowed.

A. He said, get out of her you Bohunk son-of-a-bitch—that is just what he said."

XIX.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, is as follows:

"Q. Are you able to say, if you are able to say, state, what, in your opinion is the degree of impairment of the plaintiff's strength in the use of his shoulder and consequent impairment of his earning power by the failure to properly set this bone and have it corrected in the proper and natural way?

Mr. Donohoe. To which question we object as incompetent, irrelevant, and immaterial in so far as it applies to the second cause of action. We have no objection to this testimony as applied to the first cause of action.

A. In answering that question I can only give my opinion that the man in his present condition is impaired from performing his function, his vocation as a laboring man. If his vocation

is that of a miner, I would say—yes requiring the use of both of his arms. As I have previously stated, if the man had the benefit of a masseur, months it would probably take, there would probably be considerable improvement in the use of that right arm, possibly there might not be. I am inclined to question whether he will" (R. p. 144).

XX.

The Court erred in allowing testimony to be introduced over the objection of defendant, which testimony, objection, and the ruling of the Court appear on pages 174 and 175 of this record and are in the following words:

"Q. Tell what happened there?

Mr. Donohoe—We object to that question on the ground that it is incompetent, irrelevant and immaterial, and not within the issues joined by the pleadings. It comes back to the proposition of the part of the complaint which was stricken out on our motion in the first complaint, and goes to the question of signing a release to the company.

Objection overruled, defendant allowed an exception.

The Court—*Who was present first and* when was it? A. Mr. Estey.

Q. Anybody else?

A. After a while came Mr. Gedney—after ten or fifteen minutes came Mr. Gedney.

Q. What was said by Tony and Mr. Estey and Mr. Gedney?

A. Mr. Estey told Tony to sign papers, this paper—it says it was nobody's fault—it is Tony's fault himself. He said I never signed this paper because it is not my fault, and Mr. Estey told

him, If you not sign this paper the Company charge you for board while you are in the hospital and Tony said, I can't help it—that is all.

Q. Did you at any time in the office or the store of the Company hear any conversation between Tony and either Mr. Gedney or Mr. Estey?

A. No, I did not.

Q. Was that the only time in the office or the store of the Company hear any conversation between Tony and Mr. Estey?

A. Yes, sir—after a while Mr. Estey he go and talk to Mr. Gedney.

Mr. DONOHOE—We object to any testimony about Mr. Gedney because Mr. Gedney was not in charge of the mine at that time as shown by the plaintiff's own testimony.

The COURT—The last part of that answer regarding Mr. Gedney may be stricken."

XXI.

The Court erred in denying the motion of defendant, made for defendant at the close of the plaintiff's case, to instruct the jury to return a verdict in favor of defendant and against the plaintiff, for the following reasons (R. pp. 180-181-182-183):

(a) Plaintiff in the second paragraph of his reply to the defendant's affirmative defense to plaintiff's second cause of action admits that the only hospital treatment he knew he would receive in case he was injured, in consideration of the $1.50 per month, deducted from his wages as hospital dues, was as follows: 'He knew the defendant had a house equipped as a sort of crude hospital with a woman in charge of the same.' He knew nothing of any further method

of caring for the injured employees and never had any conversation with any of the company's officials regarding the deduction of a dollar and a half a month from his wages for hospital dues or what it would entitle him to in case he was injured while in the defendant's employment.

The evidence shows conclusively that so far as he was concerned he received all the hospital care and attention to which he was entitled under his alleged hospital contract.

(b) That the evidence offered by the plaintiff wholly failed to sustain plaintiff's second cause of action.

(c) That the evidence offered by the plaintiff in support of his second cause of action is uncertain and indefinite and from this evidence it is impossible for the jury to determine with any degree of certainty that portion or part of the plaintiff's alleged suffering and pain is, or was due to the alleged negligence of defendant in not furnishing plaintiff with timely and sufficient surgical care and medical and hospital services, and what portion or part of plaintiff's alleged suffering and pain was due to the original injury, and any verdict found by the jury in favor of plaintiff on his second cause of action would be purely speculative, as the damage, if any, sustained by plaintiff, under his second cause of action, is entirely too remote and uncertain to be ascertained from the evidence.

(d) That the evidence offered by plaintiff in support of his second cause of action is uncertain and in-

definite and from the evidence it is impossible for the jury to determine with any degree of certainty the extent, if any, to which the original injury has been aggravated by reason of the alleged negligence of the defendant in not furnishing plaintiff with timely and sufficient surgical care and medical and hospital services, and any verdict found by the jury in favor of plaintiff's second cause of action would be purely speculative, as the damages, if any, sustained by plaintiff under his alleged second cause of action are entirely too remote to be ascertained from the evidence.

(e) That any damages sustained by plaintiff by reason of the injuries he sustained on the 12th day of January, 1916, or in any manner growing out of the said injuries will be fully compensated by the findings of the jury in plaintiff's first cause of action and to permit the plaintiff to recover any damages whatever under his second cause of action would be allowing him to recover twice for the same cause.

XXII.

The Court erred in sustaining the motion and objections made by plaintiff to the questions asked George Newlove, a witness for defendant, during his direct examination while a witness on the stand in behalf of defendant; appearing at pages 288 and 289 of this record in the following words:

> "Q. Since you examined the plaintiff on the third day of January have you had occasion to examine another man whose right clavicle was fractured and a union affected? A. I have.

Mr. Ritchie—We move to strike the answer and interpose the objection that it is irrelevant and immaterial—the doctor has already testified that there is a good deal of variance between clavicles and individuals.

Mr. Donohoe—We propose to follow this testimony by placing a man on the stand by whom we will demonstrate that the overlapping of his right shoulder, his right clavicle, far exceeds any overlapping claimed in this case of plaintiff and will demonstrate to this jury that he has absolutely free and complete use of his arms in any manner he sees fit to use them, and we will propose later on to place these two men, this man and plaintiff, side by side before this jury so they can see absolutely the condition of the two clavicles and the use of their respective arms."

After argument by counsel the motion to strike the answer was by the Court granted and the objection sustained. To which ruling of the Court counsel for defendant was allowed an exception.

"Q. Doctor, in this examination of the man referred to in the last question, did you discover whether or not in the union of the clavicle there was an overlapping of the two ends of the bone?

Mr. Ritchie—We object to this question as to all similar questions on the ground that Doctor Newlove qualified as an expert on this, and he can testify either from his general knowledge of a great many cases or what he has learned from the books as to the results of overlapping or any other condition, but to take a particular isolated case and state that in that case something similar had not resulted in a permanent

injury would be simply making all cases stand as an exception.

The objection was by the Court sustained; defendant allowed an exception to the ruling.

Q. Doctor, will you name the man whom you have examined since examining the plaintiff, who had an overlapping of his right clavicle in affecting a union after a fracture?

Mr. RITCHIE—We object as irrelevant and immaterial.

Objection sustained; defendant allowed an exception.

XXIII.

The Court erred in sustaining the objection made by plaintiff to the questions asked Harry W. Ells, in his direct examination, while a witness on the stand in behalf of the defendant, which questions, objections and ruling of the Court are in the following words:

"Q. Did you some time ago receive a fracture of your right clavicle or collar-bone?

Mr. RITCHIE—We object to that as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Q. How long after receiving an injury that resulted in the fracture of the right clavicle was it before you resumed work?

Same objection.

The COURT—The objection will be sustained. He has not testified he had a broken clavicle.

Mr. DONOHOE—I know, but I don't know how else I can get this into the record.

The COURT—In order that counsel may un-

derstand the Court's position, it is simply this: You have called expert witnesses to testify from their knowledge and experience. Now, it would certainly not be proper, on the theory of expert witnesses, to now call in the parties from whom they may have gained their experience. They have testified as expert witnesses.

Mr. Donohoe—No, I do not propose to do that. In the examination yesterday Doctor Boyle was permitted to have the plaintiff take his clothing off the upper part of his body and was permitted to demonstrate to the jury a depression in his shoulder and to demonstrate in the shoulder what he called a malformation of the collar-bone or clavicle. With this witness I propose to demonstrate a greater depression and a greater malformation of the clavicle, demonstrate by this man that he hasn't the slightest bit of trouble using his right arm in any manner conceivable, and further propose to stand the two men up there, side by side, so the jury could examine them and pass upon them themselves. It is a demonstration—not expert testimony—just as the plaintiff had a right to put in a photograph of the right clavicle from a book on anatomy—we certainly have the right to introduce this witness for that purpose. I am endeavoring to show to this jury the improbability that this plaintiff's arm is affected the least bit by the malformation he claims in his clavicle, by showing another man who has a similar or more extensive malformation, who has the full use of his arm.

The Court—The objection will be sustained and defendant allowed an exception.

Q. Did you enter the United States Army as a recruit subsequent to receiving a fracture in the right clavicle?

Mr. Ritchie—We object as incompetent and irrelevant.

Objection sustained; defendant allowed an exception.

Q. Have you any difficulty in using your right arm in any position you choose to use it in?

Same objection; objection sustained; defendant allowed an exception to the ruling.

Q. Have you any difficulty in extending your right arm perpendicularly over your head and shoulders?

Same objection; objection sustained; defendant allowed an exception" (R. 300-1-2).

XXIV.

The Court erred in giving the following part of Instruction No. II, to which plaintiff in error duly excepted and its exception was allowed (R. p. 313): (R. p. 323):

"You are instructed that if the defendant in this case denied the existence of injuries or disability suffered by plaintiff while in its employment and refused him any further surgical or medical care, plaintiff thereupon became entitled to leave defendant's premises and to control his own movements, and defendant could not thereafter require him to return for any purposes. This would be equally true if he left defendant's premises on defendant's order."

XXV.

The Court erred in giving Instruction No. 14 as given by the Court to which defendant duly excepted and its exception was allowed (R. pp. 315-316) (R. p. 324):

"The Court will now direct your attention to the second cause of action set forth in plaintiff's complaint. This cause of action is separate and distinct from plaintiff's first cause of action and must be so considered by you. In brief, plaintiff alleges that by virtue of an arrangement existing between the defendent and plaintiff, the sum of $1.50 per month was deducted from the wages of plaintiff, entitling him to care in a hospital and to competent surgical and medical attendance at the expense of defendant, in case of his injury or illness arising in the course of his employment; that he was injured as set forth in his first cause of action; that when discharged from defendant's hospital, his physical condition was greatly impaired beyond the normal result of his original injury and this on account of the gross and wilful negligence of the defendant to furnish him the competent surgical and medical attendance to which he was entitled as aforesaid; that because of defendant's refusal and neglect to furnish him timely and sufficient care and medical and hospital service, which aggravated the result of his original injury as aforesaid, and his permanent disability and the unnecessary physical and mental suffering he has undergone he has been damaged $15,000; that he has suffered great physical pain and mental torture and still suffers some pain, other than what would naturally have resulted from his original injury, on account of defendant's refusal and failure to give him competent surgical and medical attendance to which he was entitled.

XXVI.

The Court erred in giving Instruction No. 16 as given by the Court to which plaintiff in error duly excepted and its exception was allowed (R. p. 316), (R. p. 324):

"You are instructed that the arrangement whereby defendant deducted $1.50 per month from plaintiff's wages for hospital purposes as set forth in the pleadings herein was, if not repudiated by plaintiff, in effect a contract binding the defendant at defendant's expense, free of charge, for any injury or illness arising in the course of his employment with defendant, providing that in the event of no specific agreement to the contrary, defendant would not be required to make unusual or unnecessary expenditures but only such as the requirements of the case in the opinion of competent physicians justly demanded."

XXVII.

The Court erred in giving instruction No. 17 as given by the Court, to which plaintiff in error duly excepted and its exception was allowed, as follows (R. p. 317) (R. p. 324):

"The parties being brought into this relation above described the plaintiff may maintain an action for the breach of the implied obligation caused by unskilful, negligent or improper treatment on the part of the defendant, which action is known in law as a tort, and if the plaintiff proves the allegations of his second cause of action by a fair preponderance of the evidence he is entitled to recover damages caused by the unnecessary physical pain, mental suffering

and physical disability suffered by him through defendant's negligence or malpractice."

XXVIII.

The Court erred in giving the following instruction to which plaintiff in error duly excepted and its exception was allowed (R. p. 317) (R. p. 325).

"You are instructed that if you find from the evidence that the ordinary, natural results of plaintiff's original injury were aggravated by the failure and refusal of defendant to give him competent surgical and medical care, then your verdict must be for plaintiff under the second cause of action, and you will then fix his damages at such sum as will reasonably compensate him for impairment of his earning power, if you find his earning power has been impaired by the cause mentioned, and physical and mental suffering to which he has been subjected, if any, due to that cause.

If you find that plaintiff has suffered either temporary or permanent impairment of his earning power, either partial or total, because of the failure and refusal of the defendant to give him competent surgical and medical care after his original injury, he will be entitled to recover damages under his second cause of action, which you will fix according to your estimate of the sum that will compensate him for such impairment."

XXIX.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and its exception was allowed (R. 325):

"I instruct you that under the compensation act, under which plaintiff's first cause of action is brought, an injured employee during the continuance of his disability, if requested by his employer, must submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory of Alaska, furnished and paid for by the employer. If any employee refuse to submit himself to such examination his right of compensation shall be suspended during such period of refusal; and I further instruct you that the defendant company had a lawful right o request said plaintiff to submit to said examination at Ellamar, Alaska, and if you find from the testimony that the defendant company did request the plaintiff to submit to such an examination, he is not entitled to compensation and you should consider this instruction in considering your answer to question No. 2 herewith submitted."

XXX.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and its exception was allowed (R. 326-327):

"I instruct you that under the hospital contract alleged in the pleadings, the defendant was not bound to furnish plaintiff the services of a specialist in surgery and if the plaintiff was dissatisfied with the treatment he received in the defendant's temporary hospital at Ellamar or was dissatisfied with the opinion given by Doctor Duckwall as to the condition of his right clavicle on or about the 10th day of Febru-

ary, 1916, then it was the plaintiff's duty to make his dissatisfaction known to the defendant and demand further medical or surgical aid; and unless you find by a preponderance of the evidence that the plaintiff did demand of the defendant, or its officers, further medical or surgical aid and the defendant refused to give it, then you must find for the defendant and against the plaintiff."

XXXI.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and its exception was allowed (R. p. 327):

"I instruct you that the plaintiff, in his second cause of action, cannot recover against the defendant on account of insufficient surgical care and medical and hospital services, which may have aggravated his original injury, for the reason that he has been fully compensated for such injuries in his first cause of action; therefore you cannot find in favor of the plaintiff and against the defendant in any such manner whatever on this account."

XXXII.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and its exception was allowed (R. p. 328):

"I instruct you that even if the defendant failed to furnish the plaintiff with timely and sufficient surgical care and medical and hospital services, that it was the duty of the plaintiff to seek surgical aid and medical care, from others, with a view of reducing his alleged claim for damages and if you find from the

evidence that the plaintiff had an opportunity to but failed to do so, then I instruct you that the plaintiff cannot recover any sum whatever against the defendant on account of his alleged permanent disability and his physical and mental suffering subsequent to the date that he had an opportunity to secure such other surgical and medical care."

XXXIII.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and its exception was allowed (R. pp. 328-329):

"I instruct you that plaintiff in his first cause of action seeks to recover compensation for injuries he received in the course of his employment in defendant's mine at Ellamar, Alaska, on the 12th day of January, 1916, and in his second cause of action he seeks to recover damages for the aggravation of said injuries and for mental and physical suffering alleged to have been undergone by reason of defendant's neglect to furnish him timely and sufficient surgical care and medical and hospital care; therefore, I furthur instruct you before you can find for the plaintiff on his second cause of action, you must be able to determine with reasonable certainty, the amount his original injury has been aggravated and the amount of physical and mental suffering he underwent by reason of the said neglect on the part of said defendant, as separate and apart from the mental and physical suffering he underwent as the natural result of the original injury, and unless you can find this by a preponderance of evidence, you must find for the defen-

dant and against the plaintiff on plaintiff's second cause of action."

XXXIV.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and which exception was allowed (R. 329-330):

"I instruct you that from the evidence offered it is impossible to determine with any degree of certainty the amount of physical and mental suffering the plaintiff has undergone by reason of the alleged neglect and refusal of defendant to furnish plaintiff with sufficient surgical care and medical and hospital services, from the physical and mental suffering which would be the natural result of the original injury, therefore any verdict which you might return for plaintiff on his second cause of action would be purely speculative and this the law does not allow; I therefore instruct you that you must find for the defendant and against the plaintiff on plaintiff's second cause of action."

XXXV.

The Court erred in refusing to give the following instruction to which plaintiff in error duly excepted and which exception was allowed (R. pp. 330-331):

"I instruct you that if you believe from the evidence that Doctor Duckwall was a physician and surgeon authorized to practice medicine under the laws of the Territory of Alaska, at the time he made the examination of the plaintiff on the 10th day of February, 1916, and after making said examination, he

notified the plaintiff and the defendant that the plaintiff then and there made no protest to the opinion expressed by Doctor Duckwall, and if the plaintiff, after consulting other physicians, was advised that he was still suffering from said injuries, it was the plaintiff's duty to immediately notify said defendant of this fact and to demand of defendant such other and further surgical care and hospital and medical treatment as he might need, before he could hold the defendant liable for failure on its part to perform its part of the hospital contract, and unless you find from the evidence that the plaintiff did make such demand on the defendant and the defendant refused to comply with such demand, then you must find for the defendant and against the plaintiff.

If you further believe from the evidence that as soon as the defendant company learned that the plaintiff claimed to be suffering from said injury, after he had left Ellamar, the defendant company in good faith offered to give him surgical care and medical and hospital services and that the plaintiff refused to accept the same, then I instruct you, that the defendant company did all that was required of it under the hospital contract with plaintiff, and you must find for the defendant and against the plaintiff."

XXXVI.

The Court erred in refusing to submit to the jury the following Form of Verdict to which plaintiff in error duly excepted which exception was allowed (R. p. 333):

"We, the jury sworn and empanelled to try the above entitled cause find for the defendant and against the plaintiff on plaintiff's second cause of action set forth in his third amended complaint."

XXXVII.

The Court erred in denying defendant's motion for judgment in favor of defendant notwithstanding the Verdict to which defendant duly excepted and which exception was allowed (R. pp. 339, 340, 341):

XXXVIII.

The court erred in denying the motion of defendant for a new trial herein and its order and judgment overruling said motion and granting judgment in favor of plaintiff and against defendant for the amount of the verdict found by the jury in favor of plaintiff with costs; which order and judgment were duly excepted to by the defendant and exception allowed by the Court. Said motion was based on all the files and proceedings herein and was made upon the following grounds specified therein and on each thereof to-wit (R. pp. 342 to 354):

Now comes the above-named defendant and moves this Honorable Court for an order setting aside the verdict and special findings found and returned by the jury, in said cause, on the 7th day of January, 1917, and granting defendant a new trial of said cause on the following grounds:

(a) That the damages allowed by the jury were excessive and were given under the influence of passion and prejudice.

(b) That there was insufficiency of the evidence

to justify the verdict and that the same is against the law.

(c) Errors in law committed by the Court at the trial of this action and excepted to by the party making the application.

(d) For the reason that the Court erred in submitting certain instructions to the jury and in refusing to submit other instructions to the jury which were asked to be given by the defendant and for the further reason that the Court allowed the two causes of action to be united.

XXXIX.

The Court erred in making and entering its final judgment in this case, to which plaintiff in error duly excepted and which exception was allowed, for the following reasons (R. pp. 356-357):

(a) That said judgment is against law and contrary to law and is not supported by the facts as shown by the evidence, and not justified by the evidence.

(b) That there is not sufficient evidence to support the same and especially for the reason that it is nowhere shown by the evidence that plaintiff was permanently disabled, either partially or totally, and it was nowhere shown by the evidence that plaintiff received a broken clavicle in the accident he sustained while working for the defendant company.

(c) That the entering of said judgment on plaintiff's second cause of action, for the sum of One Dollar was error for the reason that said second cause of action was a common law action and could not be joined with the first cause of action which was a special statutory proceeding and further it was error t

enter judgment on plaintiff's second cause of action because said second cause of action was an action *ex contractu* and the said first cause of action was an action *ex delicto* and could not be joined.

ARGUMENT.

IF THE PLAINTIFF IS ENTITLED TO ANY COMPENSATION OR DAMAGES FOR HIS INJURY, HE MUST SEEK THE SAME UNDER THE WORKMEN'S COMPENSATION ACT ALONE.

Plaintiff's first cause of action is brought under the provisions of Chapter 71 of the Session Laws of Alaska, 1915, commonly known as the Workmen's Compensation Act. It provides that the employer "shall be liable to pay compensation, in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives *a personal injury by accident arising out of or in the course of his or her employment.*" etc. (Sec. 1). This act then gives a schedule of compensation covering all ordinary and usual injuries arising from accidents in mines, resulting either in temporary or permanent disability, and covering both partial and total disability. As to partial disability it provides:

> "Whenever such employe receives an injury arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum

which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled, that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed four thousand eight hundred dollars ($4,800.00)."

(Session Laws Alaska, 1915, pp. 151-152).

Section 7 of the Act (page 153), provides:

"The right to compensation for an injury and the remedy therefor granted by this act shall be in lieu of all rights and remedies as to such injury now existing at common law or otherwise, and no rights or remedies, except those provided for by this act, shall accrue to employees entitled to compensation under this act while it is in effect; nor shall any right or remedy, except those provided for by this act, accrue to the personal or legal representative, dependents, beneficiaries under this act, or next of kin of such employee."

The case was tried on the theory that this act governed as to plaintiff's first cause of action, but the second cause of action was, we contend, *ex contractu*. The plaintiff was permitted to give in evidence without objection the facts concerning his alleged injuries and the extent thereof. For the purpose of determining the extent of such injuries so received, if any, the testimony of the surgeon was also doubtless competent. It was incumbent on the plaintiff to show whether the injuries were permanent or only temporary in character, and whether the same were partial or total. It was also necessary to show that such in-

juries were sustained "by accident arising out of and in the course of his employment." But testimony tending to prove anything else, such as the offer on the part of plaintiff that his injuries were caused by a defective brake (R. pp. 66-67), was clearly incompetent and was so held by the trial Court in that instance.

However, on the theory that it was proper and competent testimony as to the matters alleged in plaintiff's second cause of action, the trial Court permitted plaintiff to give his testimony that Estey, an officer of the defendant, requested plaintiff to sign a paper promising to give plaintiff half pay if he signed and threatening to throw him out the next day if he did not sign) (R. p. 76), that Gedney, the foreman for the defendant, ordered him out of the hospital (R. p. 78) and called him a "Bohunk son of a bitch," and told him to get out (R. p. 112). Now we submit that as to the first cause of action all of this was clearly incompetent and irrelevant, and indeed plaintiff's counsel introduced it as bearing on the second cause of action and not on the first cause of action set out in plaintiff's complaint. It is likewise clear that as to the first cause of action standing alone such testimony was highly prejudicial to the substantial rights of the defendant as it tended to bias and prejudice the jury against the defendant. That is the great vice of permitting the two causes of action to be joined; it permits the plaintiff, under the guise of introducing evidence to support a second cause of action, to get before the jury al-

leged declarations and actions of the defendant highly damaging and prejudicial and tending to bias the jury against the defendant upon the count under the compensation act.

Now, let us see whether, as we contend, the plaintiff, under the evidence as presented by the record, is entitled to compensation on his first cause of action alone. The Act recites that employees are entitled to compensation for personal injuries sustained

> "by accident arising out of or in the course of his or her employment."

It further provides that such compensation shall be in lieu of all rights and remedies at common law or otherwise. It further contains the significant provision that:

> "If an injured employee entitled to compensation hereunder shall be paid compensation under any sub-division or part of this schedule, and it shall afterwards develop that he or she was entitled to a higher rate of compensation under some other part or subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her."

The precise question here raised was before the Court in the case of *Ross v. Erickson Construction Co., et al.,* 155 Pac. 154, where, under a different and more elaborate statute it is true, upon the plaintiff's joinder of two pleas as in the case at bar, one under the compensation act of the state of Washington, and one at common law for the negligence of the defendant in furnishing the plaintiff with the services of a

competent physician and surgeon, the Court held that the defendant was relegated to the compensation act alone. In the course of its opinion the court reviewed the law on the subject and cited a number of cases in point:

"In *Gregutis v. Waclark Wire Works*, 86 N. J. Law, 610, 92 Atl. 355, it was sought to maintain an action under what was there known as the 'Death Act.' Laws 1848, p. 151; Comp. Laws 1910, p. 1907. It is an act like section 183, Rem. & Bal. Code, giving a right of action for the wrongful death of a person. The Court sustained a demurrer upon the ground that the Workmen's Compensation Act had provided an exclusive remedy.

The Court said:

'Since that act (the Death Act) limited the relief granted thereby to recovery in cases where the decedent would, if death had not ensued, have been entitled to maintain an action, we must now consider whether the plaintiff's intestate, if living, could have maintained an action.'

After due consideration and discussion, the Workmen's Compensation Act was held to be exclusive; the conclusion of the Court being:

'It will be observed that the Workingmen's Compensation Act deals with cases where the injury results in death, and paragraph 8 provides that, where the contract of hiring is subject to section 2 of the act, such agreement shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or determination thereof

than as provided in section 2. Obviously the remedy thereby provided in case of death, where the contract of the employe is subject to section 2, is inconsistent with the remedy provided by the Death Act, because the latter provides for a different procedure and a different rule of damages. Since the Workmen's Compensation Act by its terms repeals all inconsistent legislation, the rights and remedies thereby given are substituted for those theretofore provided by the Death Act.'

In Re Brightman, 220 Mass. 17, 107 N. E. 527, it was held that where an employe had over-exerted himself in saving his effects from a barge, which was on fire, thus aggravating a heart disease with fatal results, an award would be upheld. The Court evidently considered and rejected the doctrine of intervening agency and aggravation independent of a primary wrong, and looked only to the purpose of the law:

'In the case at bar there may be found to be apparent to the rational mind a causal connection between the employment and the thing done by the employe at the time of the sinking of the lighter. * * * Acceleration of previously existing heart disease to a mortal end and sooner than otherwise it would have come is an injury within the meaning of the Workmen's Compensation Act.'

So in Re Sponatski, 220 Mass. 526, 108 N. E. 466, a workman had been hurt by a splash of molten metal striking him in the eye. While insane as a result of the pain suffered by reason of the injury he threw

himself from a window and was fatally injured. It was held that his widow was entitled to an award; that it was immaterial whether the death was or was not a reasonable and likely consequence—the injury relating solely to the chain of physical causation between the injury and the death. We think the importance of the inquiry warrants us in reproducing the holding of the Court:

'It is of no significance whether the precise physical harm was the natural and probable, or the abnormal and inconceivable, consequence of the employment. The single inquiry is whether in truth it did arise out of and in the course of that employment. If death ensues, it is immaterial whether that was the reasonable and likely consequence or not; the only question is whether in fact 'death results from the injury.' * * * When that is established as the cause, then the right to compensation is made out. If the connection between the injury as the cause and the death as the effect is proven, then the dependents are entitled to recover, even though such a result before that time may never have been heard of and might have seemed impossible. The inquiry relates solely to the chain of causation between the injury and the death.'

In Burns' Case, 218 Mass. 8, 105 N. E. 601, the immediate cause of death was bed sores which finally produced blood poisoning. A finding that death resulted from the injury was upheld. The Court quoted from *McDonald v. Snelling*, 14 Allen (Mass.) 290, 92 Am. Dec. 768:

'The mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues.' Nor would it have been material, if that had been found to be the fact, that the bed sore was due to the mistake or the negligence of the physicians acting honestly.'

An award was upheld in *Beable v. Milton,* 5 W. C. C. (Eng.) 55. It was there complained that the workman had been the victim of malpractice. Although it was found that the treatment was not defective, it was said:

'Assuming it to have been defective, I hold that it would have been no defense to this application, inasmuch as the applicant had done all he could in going to the hospital and submitting to the treatment administered there, independently of his having gone there at the desire and with the privity and consent of the respondents.'

In *Smith v. Northern Pac. R. Co.* 79 Wash. 453, 140 Pac. 687 the law is broadly stated to be:

'If a person receives an injury through the

negligent act of another, and the injury is afterwards aggravated, and a recovery retarded through some accident not the result of want of ordinary care on the part of the injured person, he may recover for the entire injury sustained, as the law regards the probability of such aggravation as a sequence and natural result likely to flow from the original injury.'

In *Brown v. Kent,* 6 Butterworth's W. C. C. 745, a workman who had been injured in the knee, necessitating an operation, was stricken with scarlet fever contracted in the hospital. The contracted disease settled in the knee joint, making an injury, that otherwise would have been of no consequence, a permanent disability. It was held that the workman was entitled to compensation. The judges quoted from *Dunham v. Clare,* 2 K. B. 292, 4 W. C. C. 102, as follows:

'The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens,* so that the old cause goes and a new one is substituted for it, that is a new act, which gives a fresh origin to the after consequences.'

And thus observed:

'It may well be that the fever, and the condition of the patient caused by it, much increased the risk of the formation of pus; but it was the old wound which was giving the trouble—the old wound which suppurated. It was the evidence of Dr. Bone, accepted and agreed to by both parties, that if there had not been any accident, and consequent injury to the knee, the

scarlet fever could not have caused the injury or the incapacity in question. The result is necessarily that the incapacity is the result of the accident to the knee, although probably aggravated by the scarlet fever. This entitled the workman to compensation for the accident on the footing that the incapacity caused by it is continuing.' "

We submit that under the evidence in the case at bar the case of *Ross vs. Erickson Construction Co.*, above cited, is controlling; for as we view the evidence there is none from which the court or jury could determine what part of the plaintiff's injuries, if any, was attributable to the original injury, and what part was attributable to the treatment or, rather, lack of treatment he received from a physician. Indeed, the record is singularly bare of any direct or oblique statement from any witness that any part or proportion of plaintiff's alleged injuries arise from improper medical treatment subsequent to his injuries. And it was therefor manifest error to permit the plaintiff, under the theory of offering it in support of his second cause of action, to offer testimony so prejudicial to the plaintiff as that hereinbefore referred to. This question is raised upon the record by the following Assignments of Error: i to xiii inclusive, xv to xxi inclusive, xxv to xxix inclusive, xxxi, xxxiii, to xxxiv inclusive, xxxvi, xxxvii and xxxix.

THIS JOINDER OF ACTIONS CANNOT BE MAINTAINED.

We contend that the joinder of these two causes of action cannot be maintained. The action against

this defendant must be based either upon the "Workmen's Compensation Act" as passed by the Alaska Legislature in 1915, or common law. It cannot be maintained against the defendant based upon both the statute and common law, especially where a specific proceeding is provided by statute.

In the case of *McHugh v. St. Louis Transit Co.*, 88 S. W. 853, the Court said:

> "An action for damages at common law for negligence cannot be joined to one for statutory negligence"

and again in *Abernathy v. South & W. Ry. Co.*, 63 S. E. 180:

> "A proceeding being purely statutory, a cause of action for compensation and one for damages cannot be joined."

Plaintiff's first cause of action as set forth in his third amended complaint is a special statutory proceeding, that is, a proceeding to recover compensation for an injured employee under the provisions of Chapter 71 of the Session Laws of the Territory of Alaska, for the year 1915, hereinbefore quoted.

This Act provides a special measure of damages to be ascertained by special rules and procedure and cannot be joined with a common law action as pleaded in plaintiff's second cause of action, for the reason that the measure of damages and the rules of procedure governing the trial of said second cause of action are entirely different from that of the said first cause of action.

Plaintiff in his first cause of action seeks to obtain compensation for his present permanent partial

disability under the provisions of Chapter 71, as aforesaid, of which the accident occurring in the defendant's mine on the 12th day of January, 1916, was the proximate cause and he cannot join with such an action his second cause of action in which he seeks to recover damages for a portion of his present alleged injuries, for the reason that his entire injuries growing out of said accident and of which said accident is the proximate cause will be fully compensated in his first cause of action.

Any evidence offered under the second cause of action and not in support of the first cause of action, tended to bias and prejudice the jury against the defendant; as is shown by the verdict of the jury in awarding plaintiff a greater amount of compensation under his first cause of action than was asked for in his third amended complaint (R. p. 338).

These two causes of action cannot be joined because the first cause of action as set forth in plaintiff's third amended complaint is an action *ex delicto* and the second cause of action as set forth in said complaint is an action *ex contractu;* the first cause of action having for its foundation an alleged tort of the defendant and the second cause of action having for its foundation an alleged breach of a hospital contract.

That the first cause of action is an action *ex delicto* needs no argument. The second cause of action is undoubtedly an action *ex contractu* for the reason that the said second cause of action could not have been proved without evidence showing a contract between

the plaintiff and defendant and the mere fact that defendant deducted from plaintiff's wages the sum of $1.50 a month for hospital dues clearly shows a contract between plaintiff and defendant whereby defendant would be required to give plaintiff reasonable medical care and attention. Where an action is not maintainable without pleading and proving a contract—where the gist of the action is the breach of the contract, either by malfeasance or nonfeasance, it is, in substance, whatever may be the form of the pleading, an action on the contract.

1 Chit. Pl. 87; Pom. Rem. 334;
1 Lindley on Partnership 482;
Chadburn v. Rahilly, 25 N. W. 632;
141 N. W. 181;
L. R. A. 1914 C. 720.

The plaintiff not only alleged a contract in his pleading but he also introduced evidence showing that the defendant company did deduct a certain amount ($1.50 each month) out of plaintiff's wages for hospital services, medical and surgical attendance; and it was admitted by defendant that such was the case and that all injured persons were given first aid at the temporary hospital at Ellamar, Alaska, and then, if the injury was considered serious, the injured one was taken to some doctor (R. pp. 184-185-186), showing conclusively that the second cause of action is an action *ex contractu.*

We believe that it needs no further argument to show that the second cause of action set out in said complaint is an action *ex contractu* and

if this be true then the complaint does join a cause of action *ex delicto* and a cause of action *ex contractu* and it will only require the following citations to sustain our contention that the two causes of action are improperly united.

Stark v. Wellman, 31 Pac. 260;
Clark v. Great Northern Ry., 72 Pac. 477;
T. M. Loop et al. v. California So. Railroad, 63 Cal. 97; 46 Federal 735.
Boylan v. Hot Springs R. R. Co., 132 U. S. 148, 33 L. Ed. 290;

In *Sanders v. Stimson Mill Company,* 73 Pacific 688 and reported on rehearing in 75 Pac. 974, the learned Judge said:

> "An action in tort for injuries to a seaman cannot be jointed with an action on contract to furnish the seaman medical care, nursing and attendance at the expense of the ship on which he was injured."

This case is very similar to the one under consideration as in that case the plaintiff set out a cause of action for the refusal of the defendant to furnish medical care, nursing, etc., and also a cause of action for the original injury, which was a gun shot wound, and the Court held that the cause of action for medical attendance, etc., was one on contract and not on tort.

Plaintiff does not come within the rule whereby he can waive his contract and sue in tort because the allegations of his second cause of action nowhere allege *malfeasance* on the part of the defendant in connection with said hospital contract but does allege

nonfeasance or failure on the part of the defendant to perform its part of said contract.

12 L. R. A. 929 Note.

The Compiled Laws of Alaska do not permit the joinder of these two causes of action because Section 916, Page 403 states;

> "The plaintiff may unite several causes of action in the same complaint when they all arise out of—
>
> *First*: Contract, express or implied; or
>
> *Second*: Injuries, with or without force to the person."

No interpretation can be placed on these two subdivisions construing them as allowing the joinder of a cause of action on contract with one for injuries to the person, especially considering the following limitation under Sec. 916.

> "But the causes of action so united must all belong to one only of these classes," etc.

In *Clark v. Great Northern Ry. Company,* in considering this question (72 Pac. 479) the learned Judge said:

> "It merely authorizes the joinder of causes of like character: that is, any number of causes upon contract may be united in one complaint when the parties and the places of trial are the same. So also any number of causes of action for injuries with or without force, where the parties and places of trial are the same, may be united in one complaint. But actions on contract cannot be united with actions in tort."

Also in 183 S. W. 940, *Foy-Proctor Company v. Marshall & Thorn,* the Court said:

"Under Civ. Code Prac. touching the joinder of causes of action, the joinder of a cause of action in tort with one in contract is improper"

and again in 184 S. W. 873, *Little v. Consolidation Coal Co.*:

"Civil Code practice providing for the joinder of actions on contract growing out of the same transaction, does not authorize the joinder of actions on contract and tort."

Further these two causes of action cannot be joined because they do not admit of the same judgment.

2 Am. Dec. 109; 58 Atl. 30;
66 L. R. A. 478; 21 So. 59.

The foregoing objections and exceptions are raised on the Record by Assignments of Error: i, viii to xiii inclusive, xv, xvii to xxi inclusive, xxv to xxviii inclusive, xxxi, xxxiii, xxxiv, xxxvi, xxxvii, xxxiii and xxxix (R. pp. 363 to 400).

From the foregoing authorities and a plain reading of the "Workmen's Compensation Act" the plaintiff in this action should not be allowed to maintain these two causes of action in the same suit if for no other reason than that if he were allowed to do this he could be compensated twice for the same injury, and this the law does not allow.

This compensation act specifically repeals all actions or cause of actions which an injured person, coming within the terms of said Act, might or could have under the common law for personal injuries and it seems that this statute alone is sufficient to dispel any doubt as to whether these two causes of action

can be joined.

Session Laws of Alaska, 1915, p. 153.

To permit the joinder of these two causes of action would be to permit the plaintiff to be compensated for his injuries under the compensation act, and also be compensated for the same identical injuries under the common law provisions which were specifically repealed by the compensation act.

THERE IS NO EVIDENCE SUFFICIENT TO SUSTAIN THE JUDGMENT ENTERED ON PLAINTIFF'S FIRST CAUSE OF ACTION.

There was no evidence introduced by plaintiff which would sustain his first cause of action. A careful reading of all the evidence of plaintiff will disclose that he has nowhere shown that he received a broken clavicle in the accident complained of and there was no evidence showing that plaintiff's right arm was permanently disabled except possibly the testimony of Doctor Boyle and he did not state the fact positively, his testimony (R. p. 122) on this point being:

> "Q. Can you form any reasonable estimate as to the length of time that condition has existed?
>
> A. Well, I cannot—it might have existed six months or several years—I couldn't state with any degree of accuracy the exact length of time the condition has existed."

The testimony of Doctor Duckwall, contained in his deposition clearly contradicts any testimony that was offered as to this plaintiff's clavicle having been

broken in the accident while he was in the employ of defendant and Doctor Duckwall was the first doctor to examine plaintiff after the accident. Doctor Duckwall's deposition (R. pp. 223 and 224) is as follows:

> "From said examination I am positive that, at that time (February 10, 1916), the said plaintiff did not have a fracture of his right clavicle and that his right clavicle was entirely normal and that no bones thereof were dislocated; and that said plaintiff's right shoulder was, at that time, in its normal condition and there was no reason why plaintiff could not use his right arm and right shoulder to its full normal strength."

The only evidence introduced by plaintiff tending to show that plaintiff's right arm was permanently partially disabled was the evidence of plaintiff and Doctor Boyle and he, (Doctor Boyle) did not give direct and positive answers to the questions asked him in this regard (R. pp. 134-136).

> "Q. Now why or on what do you base your opinion that this plaintiff is at this time suffering from a disability by reason of a fracture he did have in his right clavicle"?
>
> A. I have made several examinations of the plaintiff and I have satisfied myself from manipulating his shoulder and observing the man and studying the case that there is some impairment there of the function of that shoulder.
>
> Q. Now, from your scientific knowledge and surgical knowledge, what is the reason that the use of that shoulder is now impaired?
>
> A. I cannot find any abnormality other than the shortening of that clavicle.
>
> Q. Would the shortening of the clavicle

necessarily cause any impairment of the shoulder?

A. In some instances it does and in some it does not.

Q. You cannot assign any physical reason why it should, can you?

A. No."

And again we have (R. p. 149):

"Q. Can you at this time state a specific case where the clavicle was broken and in the union there was an overlapping that caused the patient to lose the use of his arm?

A. I cannot recall a case of mine of that kind, no.

Q. Nothing of that kind has come under your observation?

A. No."

The testimony of Doctor Gross in regard to the permanent partial disability of plaintiff's right arm was clearly contradictory to the testimony of Doctor Boyle (R. p. 242):

"Q. Now, after your physical examination of the plaintiff and your X-Ray examination of the plaintiff on September 5, 1916, what is your opinion of the condition of this plaintiff as to whether the plaintiff is permanently injured in his right shoulder or right clavicle at this time, or at the time you made the examination?

A. My opinion is that he was not.

Q. Is there anything that would cause him any disability in the use of his right arm or right shoulder by reason of the enlargement which you discovered upon his right clavicle?

A. I see no reason whatever for a disability."

And again the testimony of Doctor Newlove (R. pp. 286-287):

> "Q. From your examination of the plaintiff, did you discover any defect in his right clavicle or right shoulder that would, in your opinion, permanently disable him?
>
> A. In my opinion, no.
>
> Q. What is your opinion, from your examination, as to the plaintiff's ability at this time to use his arm freely as an arm is ordinarily used, or an ordinary arm is used?
>
> A. Well, I think the man could use it if he tried."

The foregoing contention, as to insufficiency of the evidence to justify a verdict on plaintiff's first cause of action, is raised on the record by Assignment of Errors: xxi, xxxvii, xxxviii and xxxix (R. pp. 381-2-3-4-400).

THERE IS NO EVIDENCE SUFFICIENT TO SUSTAIN THE JUDGMENT FOR THE PLAINTIFF ON HIS SECOND CAUSE OF ACTION.

The evidence introduced by plaintiff does not sustain his second cause of action for the reason that it does not show that he was not given proper medical care and attention but on the contrary all of the evidence shows that he was given the proper care and treatment and that even had his clavicle been broken the result obtained was an average result and one which a competent physician would be satisfied with in a similar case. We find the following testi-

mony of Dr. Gross (R. p. 249):

"Q. What is your opinion—in case there was at one time a fracture of the plaintiff's right clavicle, which caused separation—what is your opinion as to whether the union of that bone is good or bad?

A. My opinion is that the union is good.

Q. What would you say, from your experience in treating cases of a fractured clavicle, whether or not the union as you found it from your various examinations, was as good as is ordinarily obtained in such cases?

A. I would say it is as good."

And again (R. p. 283) we have the following from the testimony of Dr. Newlove:

"Q. And from the condition you found there, what would you say in your opinion as to whether the plaintiff had received good care shortly after the accident that caused that fracture or otherwise?

A. Well, from the result, I should say that he received very good care.

Q. Comparing the condition of this clavicle of the plaintiff at the point of original fracture, if there was a fracture, what would you say as to the condition you there found, as to whether it was an average good union or otherwise?

A. I should say it was an average good union.

Q. Did you detect anything in connection with the union of this clavicle that would lead you to believe that there had been surgical neglect at the time the fracture occurred?

A. Well, from present appearances, it looks to me like a very satisfactory result."

It appears from the defendant's evidence that on or about the 20th day of February, 1916, the defendant established at Ellamar a complete hospital equipped with all modern surgical appliances including an X-ray and employed a competent and experienced physician and surgeon (R. pp. 185-186-229), who examined plaintiff and found that the shoulder was bruised but the examination did not disclose that plaintiff's clavicle was broken or that he could not use his right ar mand shoulder, but that the muscles around the shoulder were sore and naturally caused the right arm to feel painful, but by massaging the muscles around the right shoulder the pain would be reduced if not entirely eliminated; but the plaintiff refused to have this done and at that time did not state that his clavicle was broken or that any bones were broken or that there was any other pain and that plaintiff went thru some exercises in the presence of the doctor that would have disclosed if any bones had been broken (R. pp. 232-250).

We believe the foregoing evidence shows conclusively that plaintiff received the best kind of treatment and such treatment that any competent physician and surgeon would have given him under like circumstances and even had his clavicle been broken that the result of the treatment given him was an average result.

We therefore believe that the evidence offered by plaintiff was insufficient to justify a verdict for the plaintiff on either of his causes of action.

ERRORS IN INSTRUCTIONS GIVEN AND REFUSED.

Errors are assigned to the giving of certain instructions, and to the refusal to give certain instructions requested by defendant.

The Court instructed the jury as follows:

> "You are instructed that if the defendant in this case denied the existence of injuries or disability suffered by plaintiff while in its employment and refused any further surgical or medical care, plaintiff thereupon became entitled to leave defendant's premises and to control his own movements, and defendant could not thereafter require him to return for any purposes. This would be equally true if he left defendant's premises on defendant's order" (R. p. 313) (Exception R. 323).

This instruction was clearly erroneous because it assumes a fact not testified to in the case; there being no testimony of the plaintiff's injury having ever been denied by defendant or that plaintiff ever denied or refused the plaintiff further surgical aid and care; and, further, that said instruction does not state the law governing plaintiff's second cause of action and covers ground entirely foreign to this cause of action and has no bearings or relation whatever to plaintiff's first cause of action.

The objection to this instruction is raised upon the record by Assignment of Errors xxiv (R. p. 389).

The Court further instructed the jury as follows:

> "The Court will now direct your attention to the second cause of action set forth in plaintiff's complaint. This cause of action is separate

and district from plaintiff's first cause of action and must be so considered by you. In brief, plaintiff alleges that by virtue of an agreement existing between the defendant and plaintiff, the sum of $1.50 per month was deducted from the wages of plaintiff, entitling him to care in a hospital and to competent surgical and medical attendance at the expense of defendant, in case of his injury or illness arising in the course of his employment; that he was injured as set forth in his first cause of action; that upon admission and during his stay there, no competent medical and surgical attendance was given him; that when discharged from defendant's hospital, his physical condition was greatly impaired beyond the normal result of his original injury and this on account of the gross and wilful negligence of the defendant to furnish him the competent surgical and medical attendance to which he was entitled as aforesaid; that because of defendant's refusal and neglect to furnish him timely and sufficient care and medical and hospital service, which aggravated the result of his original injury as aforesaid and his permanent disability and the unnecessary physical and mental suffering he has undergone he has been damaged $15,000; that he has suffered great physical pain and mental torture and still suffers some pain, other than would naturally have resulted from his original injury, on account of defendant's refusal and failure to give him competent surgical and medical attendance to which he was entitled" (R. 315) (Exception R. 324).

This instruction is clearly erroneous in that it does not completely state the allegations of plaintiff's

complaint as set forth in his second cause of action and does not correctly state the testimony offered in behalf of plaintiff in support of his second cause of action and has a tendency to bias and prejudice the jury against the defendant and against the substantial rights of the defendant and tends to mislead the jury in this case for the following reasons:

First: That it is so worded that it appears to instruct the jury that no competent medical and surgical attention was given plaintiff by defendant.

Second: That it appears to instruct the jury that the plaintiff's physical condition was impaired beyond the result of his original injury.

Third: It appears to instruct the jury that defendant did refuse and neglect to furnish plaintiff timely and sufficient care thus aggravating his original injury.

Fourth: It appears to instruct the jury that plaintiff has been damaged on his second cause of action to the amount of $15,000.

The objection to this instruction is raised upon the record by Assignments of Error xxv (R. pp. 389-390).

The Court further instructed the jury as follows:

"You are instructed that the arrangement whereby defendant deducted $1.50 per month from plaintiff's wages for hospital purposes as set forth in the pleadings herein was, if not repudiated by plaintiff, in effect a contract binding the defendant, at defendant's expense, to furnish the plaintiff competent surgical and medical attendance, free of charge, for any injury or ill-

ness arising in the course of his employment with defendant, providing that in the event of no specific agreement to the contrary, defendant would not be required to make unusual or unnecessary expenditures but only such as the requirements of the case in the opinion of competent physicians justly demanded" (R. 316) (Exception R. 324).

This instruction is clearly erroneous because it does not correctly state the law concerning the hospital contract between plaintiff and defendant as shown by the pleadings and the evidence and seems to convey the idea to the jury that the defendant under the terms of said contract was obliged to maintain at its mine a competent physician and surgeon to pass upon injuries of plaintiff at the time they occurred, all of which is predjucial to the substantial rights of the defendant and is not the law governing the case.

The objection to this instruction is raised on the record by Assignments of Error xxvi (R. p. 391).

The Court instructed the jury as follows:

"The parties being brought into this relation above described the plaintiff may maintain an action for the breach of the implied obligation caused by unskilful, negligent or improper treatment on the part of the defendant, which action is known to the law as a tort, and if the plaintiff proves the allegations of his second cause of action by a fair preponderance of the evidence he is entitled to recover damages caused by the unnecessary physical pain, mental suffering and physical disability suffered by him through defendant's negligence or malpractice" (R. p. 317) (Exception R. p. 324).

This instruction was clearly erroneous for the reason that the same does not correctly state the law governing the case and the same is prejudicial against the substantial rights of the defendant because it does not state the evidenc eor allegations of the pleadings correctly in that it uses the phrase "malpractice" which does not appear in the evidence or pleadings and it authorizes the jury to find under the second cause of action for the same matters and things covered by the first cause of action. The objection to this instruction is raised upon the record by Assignment of Error xxvii (R. p. 391).

The Court further instructed the jury:

"You are instructed that if you find from the evidence that the ordinary, natural results of plaintiff's original injury were aggravated by the failure and refusal of defendant to give him competent surgical and medical care, then your verdict must be for plaintiff under the second cause of action, and you will then fix his damages at such sum as will reasonably compensate him for impairment of his earning power, if you find his earning power has been impaired by the cause mentioned, and physical and mental suffering to which he has been subjected, if any, due to that cause.

If you find that plaintiff has suffered either temporary or permanent impairment of his earning power, either partial or total, because of the failure and refusal of the defendant to give him competent surgical and medical care after his original injury, he will be entitled to recover damages under his second cause of action which you will fix according to your estimate of the

sum that will compensate him for such impairment" (R. p. 317) (Exception R. p. 325).

This instruction was erroneous for the reason that it did not correctly state the law governing plaintiff's second cause of action, in that, it instructs the jury that they may find for plaintiff on his second cause of action for the same matters and things alleged in the first cause of action for which he will be fully compensated in his first cause of action.

The objection to this instruction is raised on the record by Assignment of Error xxviii (R. 392).

The Court refused to give the following instruction to which defendant duly excepted and its exception was allowed (R. 325).

> "I instruct you that under the compensation act, under which plaintiff's first cause of action is brought, an injured employee during the continuance of his disability, if requested by his employer, must submit himself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory of Alaska, furnished and paid for by the employer. If any employee refuse to submit himself to such examination his right to compensation shall be suspended during such period of refusal; and I further instruct you that the defendant company had a lawful right to request said plaintiff to submit to said examination at Ellamar, Alaska, and if you find from the testimony that the defendant company did request the plaintiff to submit to such an examination, he is entitled to compensation and you should consider this instruction in considering your answer to question No. 2 herewith submitted."

This instruction was certainly correct for it is expressly provided by the Compensation Act that if an employee does not submit himself to an examination, when he is injured, when requested so to do by the company then his compensation for the period during which he refused to so submit shall be deducted from the amount he is entitled to (Session Laws 1915, 165) and this instruction was not covered by other instructions given by the Court and there was evidence introduced showing that plaintiff was requested to submit himself to such examination (R. pp. 181, 182) but that plaintiff refused to do so (R. p. 181).

The exception to the refusal of the Court to give this instruction is raised on the record by Assignment of Error xxix (R. p. 393).

The Court further refused to give the following instruction to which defendant duly excepted and an exception was allowed (R. p. 326).

> "I instruct you that under the hospital contract alleged in the pleadings, the defendant was not bound to furnish plaintiff the services of a specialist in surgery and if the plaintiff was dissatisfied with the treatment he received in the defendant's temporary hospital at Ellamar or was dissatisfied with the opinion given by Doctor Duckwall as to the condition of his right clavicle on or about the 10th day of February, 1916, then it was the plaintiff's duty to make his dissatisfaction known to the defendant and demand further medical or surgical aid; and unless you find by a preponderance of the evidence that the plaintiff did demand of the defendant, or its officers,

further medical or surgical aid and the defendant refused to give it, then you must find for the defendant and against the plaintiff."

This instruction was clearly entitled to be given to the jury as it was not covered by other instructions.

The exception to this instruction not being given is raised by Assignment of Error xxx (R. pp. 393-4).

The Court refused to give the following instruction, which was duly excepted to by defendant and exception allowed (R. p. 327).

> "I instruct you that plaintiff, in his second cause of action, cannot recover against the defendant on account of insufficient surgical care and medical and hospital services, which may have aggravated his original injury, for the reason that he has been fully compensated for such injuries in his first cause of action; therefore you cannot find in favor of the plaintiff and against the defendant in any sum whatever on this account."

This instruction was clearly correct; it was not given by the Court in other instructions, and correctly stated the law and should have been given.

The exception to the refusal of the Court to give this instruction was raised on the record by Assignment of Error xxxi (R. pp. 394-5).

The Court refused to give the following instruction requested to be given by defendant and to which defendant excepted and the exception was allowed: (R. pp. 327-8):

> "I instruct you that even if the defendant failed to furnish the plaintiff with timely and sufficient surgical care and medical and hospital

services, that it was the duty of the plaintiff to seek surgical aid and medical care, from others, with a view of reducing his alleged claim for damages and if you find from the evidence that the plaintiff had an opportunity to but failed to do so, then I instruct you that the plaintiff cannot recover any sum whatever against the defendant on account of his alleged permanent disability and his physical and mental suffering subsequent to the date that he had an opportunity to secure such other surgical and medical care."

The exception to the refusal of the Court to give this instruction is raised upon the record by Assignment of Error xxxii (R. p. 395).

The Court refused to give the following instruction which was excepted to and the exception was allowed:

"I instruct you that plaintiff in his first cause of action seeks to recover compensation for injuries he received in the course of his employment in defendant's mine at Ellamar, Alaska, on the 12th day of January, 1916, and in his second cause of action he seeks to recover damages for the aggravation of said injuries and for mental and physical suffering alleged to have been undergone by reason of defendant's neglect to furnish him timely and sufficient surgical care and medical and hospital care; therefore, I further instruct you before you can find for the plaintiff on his second cause of action, you must be able to determine with reasonable certainty, the amount his original injury has been aggravated and the amount of physical and mental suffering he underwent by reason of the said neglect on the part of said defendant, as separate and

apart from the mental and physical suffering he underwent as the natural result of the original injury, and unless you can find this by a preponderance of evidence you must find for the defendant and against the plaintiff on plaintiff's second cause of action" (R. pp. 328-9).

This instruction was correct in stating the law because the jury certainly could not take into consideration the amount of physical suffering the plaintiff underwent by reason of the original injury and apply it to the second cause of action; and this instruction was not covered by other instructions given by the Court. The exception to the refusal of the Court to give this instruction was raised on the record by Assignment of Error xxxiii (R. p. 396).

The Court refused to give the following instruction which was excepted to by defendant and the exception was allowed.

"I instruct you that from the evidence offered it is impossible to determine with any degree of certainty the amount of physical and mental suffering the plaintiff has underwent by reason of the alleged neglect and refusal of defendant to furnish plaintiff with sufficient surgical care and medical and hospital services, from the physical and mental suffering which would be the natural result of the original injury, therefore any verdict which you might return for plaintiff on his second cause of action would be purely speculative and this the law does not allow; I therefore instruct you that you must find for the defendant and against the plaintiff on plaintiff's second cause of action" (R. pp. 329-330).

The exception to this instruction being refused to be given to the jury is raised on the record by Assignment of Error xxxiv (R. p. 397).

The Court erred in refusing to submit the following form of Verdict to the Jury, requested to be submitted by defendant, to which refusal defendant duly excepted and the exception was allowed:

> "We, the Jury sworn and empanelled to try the above entitled cause find for the defendant and against the plaintiff on plaintiff's second cause of action set forth in his third amended complaint" (R. p. 333).

Assignment of Error xxxvi (R. p. 399).

We think each of these instructions was proper and should have been given for the reasons already stated.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the trial Court should be reversed, and the action dismissed.

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and
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